87-535

SUPREME COURT OF THE UNITED STATES

CASE NO. _____

October Term, 1987

CHRISTOPHER DeBOCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER THE OPINION BELOW, WHICH INTERPRETED AN AMENDEMNT TO FLORIDA'S IMMUNITY STATUTE IN A MANNER CONSISTENT WITH FEDERAL CONSTITUTIONAL PRINCIPLES, RAISES A FIFTH ADMENDMENT OR EQUAL PROTECTION ISSUE WORTHY OF CERTIORARI CONSIDERATION?

(Petitioner's questions re-stated and consolidated).

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OPINIONS BELOW

The Respondent accepts the Petitioner's statement, but would add the following citations: The opinion of the Fourth District Court of Appeal is reported as State v. Rendina, 467 So.2d 734 (Fla. 4th DCA 1985). The opinion rendered by the Florida Supreme Court is reported as DeBock v. State, 512 So.2d 164 (Fla. 1987).

JURISDICTION

The Respondent accepts the Petitioner's Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by the Petitioner, Respondent adds the Florida Immunity Statute as it existed prior to the 1982 amendment. The 1975 Statute analyzed in Ciravolo v. the Florida Bar, 361 So.2d 121 (Fla. 1978), provided:

> Witnesses; person not excused from testifying in certain prosecutions on ground testimony might incriminate him; immunity from prosecution.--No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or state attorney, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him

to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

STATEMENT OF THE CASE

Richard F. Rendina, an attorney, was charged by an information filed June 21, 1984, with the felony offense of offering a public servant unlawful compensation or reward for official behavior. In conjunction with the prosecution of Rendina, Christopher DeBock, who was at the time of the charged incident an assistant state attorney, was served with a subpoena to appear at a deposition. DeBock appeared but refused to testify, asserting his Fifth Amendment right against self incrimination.

The prosecuting attorney sought to have DeBock held in contempt, because by operation of applicable Florida law, DeBock had received immunity from criminal prosecution and could thus no longer assert a Fifth Amendment privilege. DeBock took the position that his testimony could not be compelled unless the State obtained

immunity from Bar disciplinary proceedings from the Florida Supreme Court as well.

The trial court entered an order declining to hold DeBock in contempt. (Petitioner's Appendix A). The State filed a Petition for Common Law Certiorari in the Fourth District Court of Appeal of Florida. That Court reversed, and held that DeBock would have to seek Bar immunity for himself, because §914.04 Fla.Stats. (1983) immunizes a witness solely from criminal prosecution. State v. Rendina, 467 So.2d 734 (Fla. 4th DCA 1985). (Petitioner's Appendix B).

DeBock sought review in the Florida Supreme Court. Although initially the Court reversed the intermediate court's decision (Petitioner's Appendix C), on rehearing the Court affirmed. DeBock v. State, 512 So.2d 164 (Fla. 1987). (Petitioner's Appendix D). The Court held a grant of immunity

pursuant to §914.04 Fla. Stats. (1983), is not required under the Fifth Amendment privilege to extend to a bar inquiry. Noting that the statute now gives only use immunity, whereas it formerly provided transactional immunity so that no penalty would follow, civil or criminal, the Court held that the only immunity given any professional now is immunity from criminal prosecution. There thus can be no equal protection argument because all professionals are treated equally. Alternatively, the Court noted that there are rational reasons for treating attorneys differently from other professionals, due to their unique role as officers of the Court.

The Court granted stays of proceedings in both this case and the Rendina prosecution through October 5, 1987, to enable DeBock to seek any further stay from this

Court. This Court denied DeBock's stay application on November 2, 1987. Subsequently, Richard Rendina entered a plea of nolo contendre to a lesser charge. At this time, Respondent does not suggest that the present case is moot because there is an ongoing investigation concerning other allegations regarding Rendina, and DeBock's testimony is still being sought in that investigation.

REASONS FOR DENYING THE WRIT

THE OPINION BELOW INTERPRETED AN AMENDMENT TO FLORIDA'S IMMUNITY STATUTE IN A MANNER CONSISTENT WITH FEDERAL CONSTITUTIONAL PRINCIPLES SO THAT NEITHER A CERT-WORTHY EQUAL PROTECTION NOR A FIFTH AMENDMENT ISSUE HAS BEEN RAISED; FURTHERMORE, THE RESULT REACHED IN THE COURT BELOW WAS CORRECT.

DeBock asserts the Florida Supreme Court has found bar disciplinary proceedings remedial for Fifth Amendment purposes while all other disciplinary proceedings are penal, thus denying equal protection to lawyers. Not so. The Florida Supreme Court has decided a question of state law, by determining that the 1982 amendment to §914.04 Fla. Stats. (1983) has narrowed the scope of immunity so it now provides only for use and derivative use immunity. This is all that is required by the Fifth Amendment, for as

this Court held in Kastigar v. United States, 406 U.S. 441 (1972), a grant of use and derivative use immunity is co-extensive with the scope of the privilege against self-incrimination and therefore is sufficient to compel testimony over a claim of privilege.

Prior to the 1982 amendment, the Florida immunity statute provided broader protection than the Fifth Amendment demands. For example, the 1975 version of the statue, analyzed in Ciravolo v. The Florida Bar, 361 So.2d 121, 122-123 (Fla. 1978), provided, "No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying . . . upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or for-

feiture, but no person shall be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence . . ." Thus, the Ciravolo decision, consisted with prior case law interpreting the immunity statute,[1] found that it referred to more than criminal prosecution, and protected a person compelled to testify from any "penalty or forfeiture" for those matters concerning which the testimony or evidence is produced.

In 1982, the Florida legislature amended the statue so that it now provides "no testimony so given or evidence so produced [compelled by a subpoena] shall be

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[1] See, e.g., Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1973); Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla.1952).

received against [the witness] upon any criminal investigation or proceeding." The Florida Supreme Court pointed out this statutory change in its decision below, and observed "by its plain terms, section 914.04 now is limited strictly to 'any criminal investigation or proceeding'." DeBock v. State, 512 So.2d 164, 167 (Fla. 1987).

Therefore, the amendment to §914.04 Fla. Stats. eliminated any distinction between the rights of lawyers and the rights of other professionals as to the consequences of receiving statutory immunity. As a result of the amendment, neither lawyers nor other licensed professionals have any claim to automatic immunity from use of their compelled testimony in disciplinary proceedings by virture of receiving immunity under the statute. There is no federal equal

protection issue arising from these circumstances.

Nevertheless, DeBock asserts the equal protection question can be addressed because "federal constitutional law alone requires that the Fifth Amendment privilege -- and its counterpart, immunity -- be fully applicable to such [professional disciplinary] proceedings". (Petition, p. 15). Debock's argument in this regard is without merit. The Fifth Amendment by its own language is limited to criminal prosecutions: "nor shall be compelled in any criminal case to be a witness against himself." This Court has rejected claims that the Fifth Amendment privilege applies in civil proceedings for penalty or forfeiture. In United States v. Ward, 448 U.S. 242, 248 (1980), it was stated:

> The distinction between a civil penalty and a criminal penalty is of some constitutional import. The self-incrimination clause of the Fifth Amendment, for example, is expressly limited to "any criminal case."

Likewise, in Garner v. United States, 424 U.S. 648, 655, (1976), the Court noted:

> Despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries. Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a non-criminal investigation of himself.

See also, Ullmann v. United States, 350 U.S. 422 (1956).

Therefore, by finding that the amendment to the immunity statute limited its scope to use and derivative use immunity,

the Florida Supreme Court did not decide a Fifth Amendment issue contrary to principles announced by this Court. Rather, it interpreted a State law in a manner consistent with this Court's Fifth Amendment precedents.

Assuming, arguendo, that the Florida Supreme Court will continue to follow its Seymour and Lurie[2] decisions despite the clear indication in the opinion below that the statutory change renders them no longer valid, there is no equal protection violation and decision below was correct. Lawyers, as officers of the Court, may be held to higher standards of conduct than other regulated professions. In Florida, the bar is regulated by the Florida Supreme

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2 Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952); Lurie v. Florida State Board of Dentistry, 288 So.2d 233 (Fla. 1974).

Court. Art. V, § 15, Fla. Const. Other professions are regulated by the legislature, which has established a State Department of Professional Regulation. Ch. 455, Fla. Stats. Accordingly, the legislature can authorize state attorneys to grant immunity to other professionals but bar immunity can only be granted by the Florida Supreme Court.

This classification does not impair a fundamental right, because, as the State has discussed, the Fifth Amendment's scope is limited to criminal prosecutions. Further, several Federal Courts have rejected claims in bar admission cases that the right to practice law is a fundamental right requiring "strict scrutiny" under equal protection analysis. Lupert v. California State Bar, 761 F.2d 1325, 1327 n. 2 (9th Cir) appeal dismissed U.S. ___, 106 S.Ct. 241 (1985); Nordgren v.

Hafter, 789 F.2d 334, 338 (5th Cir.) cert. denied ___ U.S. ___, 107 S.Ct. 177 (1986); Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont.), affirmed. 419 U.S. 955 (1974). Therefore, the appropriate equal protection standard is rational review, i.e., whether the classification bears some fair relationship to a legitimate public interest. Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985); Cline v. Supreme Court of Georgia, 781 F.2d 1541 (11th Cir. 1986); Salibara v. Supreme Court of Ohio, 730 F.2d 1059 (6th Cir. 1984).

Although DeBock has been admitted to practice, he cannot responsibly assert any fundamental right to practice free of inquiry into his character and continued fitness to practice law. As this Court observed in Goldfarb v. Virgina State Bar, 421 U.S. 773, 792 (1975), states have a compelling interest in the practice of

professionals within their boundaries and as part of the power to protect public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. In Edelstein v. Wilenta, 812 F.2d 128, 132 (3rd Cir. 1987), the Court expressly held an attorney's claim there is a fundamental right to practice law was contrary to established precedent that, absent impingement on some other fundamental right, States may establish regulations limiting admission to the bar subject to review only under a rational relationship standard.

The cases cited by DeBock which describe general equal protection principles do not specifically apply to regulations governing the practice of

law.[3] It is reasonable for the Court which admits attorneys to practice to have the authority to sanction them for professional misconduct. Standing Committee on Discipline v. Ross, 735 F.2d 1168 (9th Cir. 1984). The Florida Supreme Court found there is a rational basis for holding attorneys to different standards than other regulated professions: "the unique role of attorneys as officers of the court mandates that attorneys be held to the highest of ethical standards." DeBock v, State, 512 So.2d 164, 168 (Fla. 1987). Thus, even if it can be said that an equal protection issue was decided below, the State maintains it was decided correctly and review by this Court is not warranted.

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[3] Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985), was decided under the Privileges and Immunities Clause, and not the Equal Protection Clause.

DeBock further contends that by adhering to Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1975), the Florida Supreme Court has resolved a Fifth Amendment issue in a manner inconsistent with federal law. This is a misapprehension of the court's comments below at 512 So.2d 168. The rule announced in Ciravolo is that no executive officer can confer immunity from Bar discipline proceedings by virture of the Florida Constitution's separation of powers. This rule remains intact as a matter of Florida Constitutional law. In the present case, the Court below has correctly ruled that if an attorney/witness desires immunity from bar proceedings, he must request it himself. This hypothetical availability of immunity, and the Florida Supreme Court's ruling concerning standing to request it,

are not dependent on a constitutional or statutory right to immunity.

Finally, citing Lefkowitz v. Cunningham, 431 U.S. 801 (1977), and Spevack v. Klein, 385 U.S. 511 (1967), DeBock asserts that the Florida Supreme Court has decided an important Federal question in a manner conflicting with these decisions. Both cases are distinguishable. Lefkowitz holds that a witness may refuse to testify in a civil proceeding where his answers could later be used in a criminal prosecution; in the present case, DeBock has been given immunity from criminal prosecution. Spevack v. Klein, 385 U.S. 511 (1967), holds that a lawyer can not be disbarred solely because he has claimed the Fifth Amendment privilege; the present case concerns the different matter of whether DeBock, having been given immunity from criminal prosecution, may

continue to refuse to testify in a criminal investigation regarding another attorney.

In sum, it is the State's position that the Florida Supreme Court decided a question of state law -- the scope of the state's immunity statute -- and there is no federal question upon which review can be granted. Michigan v. Long, 463 U.S. 1032 (1983). Alternatively, the Court below's resolution of the Fifth and Fourteenth Amendment issues was correct and consistent with federal precedent.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, the State of Florida, Respondent, respectfully requests that the Petitioner's Petition for Writ of Ceriorari be denied.

Respectfully submitted,

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